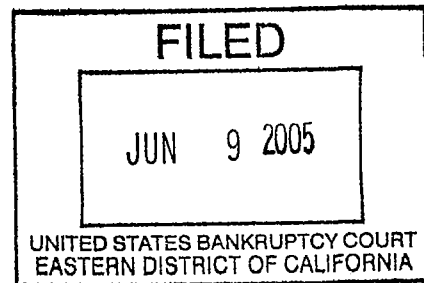


1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF CALIFORNIA
3

4 In re:) Case No. 00-21872-C-7
5 HERMAN PEREZ,) Adversary No. 05-2002
6)
7 Debtor(s).)
8 _____)
9 HERMAN PEREZ,)
10)
11 Plaintiff(s),)
12 v.)
13 CATHY PEREZ, aka CATHY MORITZ)
14 McKINNEY,)
15 Defendant(s).)
16 _____)



14 FINDINGS OF FACT AND CONCLUSIONS OF LAW
15

16 The trial of this adversary proceeding was held on June 7,
17 2005. Herman Perez and Cathy Perez, also known as Cathy Mortiz
18 McKinney, were married September 19, 1995, and separated as early
19 as May 28, 1998, in a process in which Mr. Perez moved out,
20 returned, and left again.

21 At the time of the marriage, Mr. Perez owned a residence at
22 26942 Madison Street, Esparto, California.

23 In 1996 Mr. and Mrs. Perez transmuted her residence into
24 community property by appropriate deed. In a loan transaction
25 dated June 1, 1998, Mr. and Mrs. Perez borrowed \$35,000 from
26 Firstplus Financial, Inc., secured by a deed of trust on their
27 residence. Of that sum, \$28,603 was used to pay off a prior
28 existing debt, settlement charges to borrower were \$3,737.50, and

1 the proceeds paid directly to Mr. and Mrs. Perez were \$2,659.50,
2 which sum they divided among themselves. The \$28,603 that was used
3 to pay existing loans reflected credit card debt that had built up
4 during the marriage and that was in the nature of community debt.

5 Mrs. Perez lost her job when her employer closed in 1997, at
6 which time she received a severance package of approximately \$7,000
7 (it is not clear whether that was merely a distribution of pension
8 proceeds or some other income).

9 Mrs. Perez opened a daycare center. Various items were
10 purchased to provide the facilities for the daycare center. In
11 addition, a van was purchased.

12 The daycare center did not thrive. The IRS form Schedule C,
13 Profit or Loss from Business (Sole Proprietorship), reflects a net
14 loss of \$2,042 in 1997, a net loss of \$2,672 in 1998, and a net
15 profit of \$14,407 in 1999.

16 Mrs. Perez filed for divorce on June 30, 1999, based on
17 irreconcilable differences. The petition requested that Herman
18 Perez pay the second mortgage on the residence on which the balance
19 due was said to be approximately \$37,000 and that the residence be
20 transferred to Cathy Perez as her sole property. Mr. Perez did not
21 oppose the divorce. A Judgment of Dissolution was entered on
22 August 16, 1999. There was no child or family support provided for
23 nor was there any provision for spousal support. In addition, the
24 Judgment requested that Herman Perez pay the second mortgage and
25 that his interest in the residence be transferred to Cathy Perez.

26 Mr. Perez complied with the terms of the dissolution order.
27 He deeded his interest in the premises to his former spouse, and he
28 made regular payments on the second mortgage.

1 Mr. Perez filed a bankruptcy case on February 18, 2000,
2 represented by attorney Harry P. Roth.

3 The debtor's Schedule A included an attachment stating that
4 Mr. Perez was "to make the payment on the second mortgage to his
5 wife's home in lieu of spousal support."

6 His former spouse was not listed as a creditor and did not
7 appear on the mailing matrix. She was, however, listed as a co-
8 debtor on Schedule H.

9 Mr. Perez received a discharge on May 25, 2000. The
10 bankruptcy case was closed on June 1, 2000.

11 Mr. Perez continued to make regular monthly payments on the
12 second mortgage pursuant to his obligation under the marital
13 dissolution agreement until Mrs. Perez sold the property in August
14 2003. Specifically, he made monthly payments of \$388.17 from July
15 11, 1999, through August 11, 2003, and prepaid principal in the
16 amount of \$208.30.

17 When Mrs. Perez sold the property, there was a payoff on the
18 loan through the escrow (to Litton Loan Servicing, the then-
19 servicer of the loan) for \$33,709.58.

20 After the house sale closed, Cathy Perez demanded that Herman
21 Perez pay her the \$33,709.58 that had been taken from the sale
22 proceeds of her house. This litigation ensued.

23 The parties did not intend that the loan payoff obligation in
24 the judgment of dissolution of the marriage be in "lieu of spousal
25 support." In addition, it served the purpose of allocating
26 community debt.

CONCLUSIONS OF LAW

1
2
3 Since the court is persuaded that the parties did not intend
4 that there be spousal support and did not intend that Mr. Perez's
5 promise to pay the second mortgage loan would function in the
6 nature of spousal support, the court is persuaded that the
7 obligation cannot now be characterized as nondischargeable spousal
8 support under 11 U.S.C. § 523(a)(5).

9 The only possible basis for relief would be under 11 U.S.C.
10 § 523(a)(15), which requires a more nuanced analysis of the current
11 financial condition of the parties and a balance of hardship. If
12 § 523(a)(15) were to be before this court, the outcome might be
13 considerably different because the balance of hardship appears to
14 the court to tilt slightly in favor of Cathy Perez. Nevertheless,
15 § 523(a)(15) is not before this court because the parties have
16 agreed that it is not before this court and agreed to that effect
17 twice: first, before trial; second, during trial.

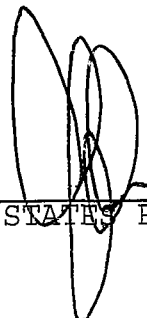
18 There is no question that a § 523(a)(15) action was not filed
19 by Cathy Perez before the deadline specified by Federal Rule of
20 Bankruptcy Procedure 4007, which implements § 523(c). There is
21 also no question that Cathy Perez did not know of the existence of
22 Herman Perez's bankruptcy until after the sale of her home in
23 August 2003. Under the circumstances, it would be possible to
24 argue in favor of equitable tolling. This court, however, cannot
25 substitute its judgment for the knowing litigation decision of the
26 parties. The reality is that Mr. Perez could have relied on his
27 discharge to stop making the \$388.17 payments when he received his
28

1 discharge in 2000, and that he continued making his payments
2 through August 2002,

3 Accordingly, judgment will be entered in favor of Herman Perez
4 declaring that his obligation to pay the second mortgage as
5 established by the marital decree is not a debt excepted from
6 discharge under § 523(a)(5).

7 An appropriate judgment will issue.

8 Dated: June 9, 2005.

9
10 
11 _____
12 UNITED STATES BANKRUPTCY JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

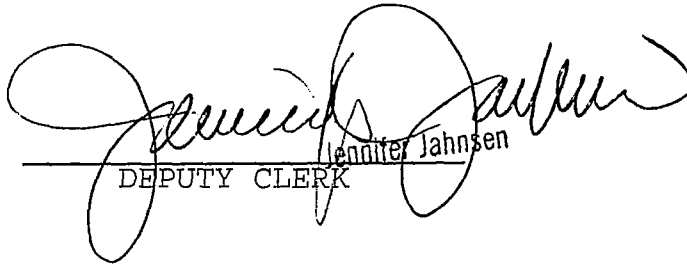
CERTIFICATE OF SERVICE

On the date indicated below, I served a true and correct copy(ies) of the attached document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States mail or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's Office.

Sean H. Colon
PO Box 370
Woodland, CA 95776-370

Karen Ehler
433 2nd St #101B
Woodland, CA 95695

Dated: 6-10-05


JENNIFER JAHNSEN
DEPUTY CLERK